United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL 75-7519

United States Court of Appeals

For the Second Circuit.

THE FIRST NATIONAL BANK OF CINCINNATI,
Plaintiff.

-against-

SIDNEY PEPPER,
Appellant-Cross-Appellee.

ROSALIE M. ARLINGHAUS, Individually; ROSALIE M. ARLINGHAUS, as Custodian for Frank H. Arlinghaus, Jr.; ROSALIE M. ARLINGHAUS, as Custodian for John C. Arlinghaus; ANNA MARIE SCHLERETH; HARRY W. BOGGAARDS, JR.; ELSIE W. COX; RICHARD M. HOUGH; RALPH J. DEL CORO; BERTHA A. BROGLIE; ALIX ANN ARLINGHAUS,
Appellees.

ROSALIE M. ARLINGHAUS, as Executrix of the Will of Frank H. Arlinghaus,
Appellee-Cross-Appellant.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF OF CROSS-APPELLANT

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REPLY BRIEF OF CROSS-APPELLANT

INTRODUCTION

There is but one issue on this appeal by Mrs. Arlinghaus: Can a state constitutionally enact and apply a long-arm statute which provides that an attorney who renders legal

services to an estate probated therein, and who accepts payment for those legal services, is subject to the jurisdiction of that state's courts in accounting proceedings in connection with the estate? If a state can constitutionally enact such a statute, the judgment entered by the County Court of Monmouth County, New Jersey, against Sidney Pepper must be accorded full faith and credit. Undeniably, the New Jersey legislature intended to confer upon the courts of New Jersey the full jurisdictional powers permitted by the United States Constitution.

STATEMENT OF THE FACTS

Sidney Pepper is a lawyer. For over 30 years he represented the interests of Frank H. Arlinghaus (861a). Thus, it is hardly surprising that, following the death of her husband in 1964, Mrs. Arlinghaus retained Pepper's firm as both her personal attorney and the attorney for the estate of her husband (136a). During Pepper's representation of the estate, Mrs. Arlinghaus paid, out of the assets of the estate, bills for legal services allegedly performed by him totaling more than $19,000 (857a). However, as a result of the disclosure of the self-dealing and breaches of fiduciary duty which form the basis for the interpleader portion of the instant action and a related action, *Arlinghaus v. Ritenour, et al.*, 68 Civ. 3537 (S.D.N.Y.), CA 75-7616, Mrs. Arlinghaus dismissed Pepper as attorney for the estate in 1968 (137a).

Subsequent to his discharge, Pepper was ordered, as required by New Jersey law, by the Probate Division of the County Court of Monmouth County, New Jersey to submit an affidavit detailing the legal services allegedly rendered on behalf of the estate (855a). Nevertheless, he refused to submit any meaningful proof of legal services, submitting instead a notarized letter challenging the jurisdiction of the

New Jersey court over him (860a-863a).[1] The court explicitly rejected Pepper's jurisdictional argument and, when Pepper persisted in his refusal to furnish an affidavit of services, eventually entered judgment against Pepper for the sum of all fees paid him by the estate (869a-870a).

Pepper continues to assert that New Jersey cannot constitutionally require him to repay monies paid to him out of the assets of the estate — even though the procedure under which the judgment was rendered against him was part and parcel of the statute pursuant to which his fees were paid. It is respectfully submitted that Pepper's position ignores reality. For more than 30 years, Pepper provided legal services for Frank Arlinghaus, his family, his business interests and, ultimately, his estate (861a). He was able to receive payments for his services without court approval during the administration of the estate only because New Jersey law, in contradistinction to the laws of certain other states,[2] allows such payments, subject, however, to ratification by the probate court upon proof that the services were reasonably necessary and otherwise proper. Although he accepted the benefits provided by that law,[3] he failed to submit the affidavit of services required

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1 In a proceeding brought against him by the estate in a New York State court, Pepper likewise had set up a jurisdictional defense in order to avoid meeting the merits of the estate's claim (170a).

2 See, *e.g.*, Burns Ann. Indiana Statutes §29-1-10-13 and Nevada Revised Statutes §150.060.

3 Pepper is in error in asserting Judge Frankel found "that Pepper had committed no act 'indicating an intention to avail himself of the privilege of conducting business in [New Jersey], thus invoking the benefits and protection of its laws' " (Ans. Br. p. 19). A reading of the portion of Judge Frankel's decision which precedes the language quoted by Pepper shows that Judge Frankel ruled only that no such act occurred "there", *i.e.* in New Jersey. This position is consistent with Judge Frankel's basic premise—that Pepper could not be subject to *in personam* jurisdiction in New Jersey since it was not shown whether he had ever actually entered the state. As shown in

by statute and thereby made court approval impossible.

Thus, this is not a case in which an attorney practicing in one state is requested to render isolated legal services for a non-resident thereof. The attorney-client relationship was an ongoing and continuous one and was terminated only when Pepper's self-dealing and the breaches of his fiduciary duty to his clients were disclosed during the Delaware Chancery proceedings. He agreed to represent the estate, not for a particular litigation or in connection with a specific problem, but generally. If it were necessary to retain local counsel for a particular undertaking, he would be expected to do so. Nevertheless, Pepper retained control of all legal matters involving the estate. The era in which the effect of an attorney's practice was confined to the boundaries of the state of his admission is over. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975). As legal problems have become increasingly multi-state and national, so has an attorney's practice. Even in litigation, an area in which states have traditionally and logically required the retention of in-state counsel, it is now relatively common for a party to be represented by co-counsel, of whom one is familiar with the affairs of the party and the other familiar with the local rules of practice. Indeed, the practice of allowing out-of-state attorneys to appear *pro hac vice* is now generally accepted. It would be unconscionable to allow an attorney to hide behind a given state's licensing requirements to avoid answering charges that he has defrauded an estate which he represented.

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cross-appellant's main brief (p. 45), this basic contention is erroneous. In any event, Judge Frankel did not, and could not, find that Pepper did not receive any benefit or protection of New Jersey law.

ARGUMENT

THE NEW JERSEY COURT PROPERLY ASSERTED JURISDICTION OVER PEPPER

There are no simple rules or mechanical processes for determining whether a state court can constitutionally assert jurisdiction over a non-resident — each case must be resolved in the light of its own facts. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952); *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *Hutter N. Trust v. Door County Chamber of Commerce*, 403 F.2d 481, 484 (7th Cir. 1968). In determining whether the exercise of jurisdiction is reasonable, a court must look at the specific factual situation and decide whether, as a practical matter, the assertion of jurisdiction is consistent with "traditional notions of fair play and substantial justice." *International Shoe, supra*, 326 U.S. at 316; *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). See also *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641, 647 (4th Cir. 1961):

> "The meaning of due process in this area can be determined only by weighing the competing interests. Therefore, what is required is an analysis and weighing of the interests of a defendant in not being called upon to defend in the forum, of the plaintiff in being able to acquire jurisdiction over the defendant in the place where the cause of action arose, and of a state in being able to open its courts to the particular lawsuit."

In the instant case, Pepper, while on notice of the possibility that his asserted legal fees would be disallowed by the New Jersey Court, failed to justify the expenditure of a large sum of money by a New Jersey estate to which he owed a fiduciary duty and from which he derived con-

siderable pecuniary benefit. He "should not be in the position . . . to enjoy the fruit but to disavow the situs of the tree from which the fruit was derived." *O'Hare Int'l Bank v. Hampton*, 437 F.2d 1173, 1177 (7th Cir. 1971).

Pepper contested the jurisdiction of the New Jersey court (860a-863a), and his contention was explicitly rejected by that court (869a). That ruling is binding herein since no appeal was taken therefrom. *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931). Even assuming that Pepper's notarized letter to the court did not constitute an appearance by him, it is still clear that he has failed to satisfy the heavy burden borne by any litigant who seeks to undermine a final judgment.* *Williams v. North Carolina*, 325 U.S. 226, 233-34 (1945).

In support of his position that New Jersey lacked personal jurisdiction over him, Pepper relies almost exclusively on *Hanson v. Denckla*, 357 U.S. 235 (1958). In that case, a Pennsylvania resident established a trust, for which a Delaware bank was the trustee. Nine years later, the settlor moved to Florida and, upon her death, a Florida court asserted personal jurisdiction over the Delaware trustee and rendered a judgment relating to the distribution of the trust assets. Subsequently, a Delaware court entered a judgment inconsistent with the Florida judgment. The Supreme Court, in a 5-4 decision, held that the Florida case "involve[d] the validity of an agreement that was entered without any connection with the forum state," *id.* at 252, and that, therefore, the Florida court was without jurisdiction over the non-resident parties to that agreement.

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*The fact that the judgment sued upon herein was entered after a default makes it no less final and determinative on the merits of the controversy than a decree entered after a full trial. *Moyer v. Mathas*, 458 F.2d 431 (5th Cir. 1972).

It is important to note that the majority in *Hanson* thought that the issue was the validity of the trust agreement, with which Florida had no connection. *Id.* at 253. The dissent, on the other hand, considered the issue to be the validity of certain powers of appointment executed by the settlor subsequent to her move to Florida. 357 U.S. at 256 n.1. In the instant case, the issue concerns contacts between Pepper and an estate which was at all times domiciled in New Jersey. A completely different factual situation would present itself if, for example, Pepper had agreed to represent an estate being probated in New York and ancillary proceedings were subsequently instituted in New Jersey. Concededly, in such a situation, *Hanson* would preclude the assertion of jurisdiction over Pepper by the New Jersey court. However, the instant case is much more closely analogous to the situation which would have existed in *Hanson* if the settlor of the trust had not moved to Florida and if a Pennsylvania probate court had asserted jurisdiction over the Delaware trustee. In that case, the trust agreement would clearly have a "connection with the forum state," and, under the reasoning of the majority in *Hanson*, the assertion of jurisdiction would have been valid. The majority in *Hanson* did not indicate that it was taking back anything said in *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957), or *International Shoe, supra.* The facts herein more than satisfy the "minimal contacts" required by *Hanson.* 357 U.S. at 251.

As this Court has stated, Sections 35, 36 and 37 of the Restatement (Second) of Conflict of Laws are an attempt to define the ambits of the *International Shoe, McGee* and *Hanson* decisions. See *Leasco Data Processing Equip. Corp. v. Maxwell,* 468 F.2d 1326, 1340 (2d Cir. 1972). Section 37 of that Restatement, quoted at page 44 of cross-appellant's main brief, deals with the appropriateness of

asserting jurisdiction over a non-resident who causes effects within the forum state. As discussed below, Pepper inflicted great harm on the New Jersey estate and interferred with the functioning of the court, which had a statutory mandate to supervise the administration of that estate, and ". . . inflicting harm within a state would appear to meet whatever further constitutional requirement may arise from [the] 'territorial limitations on the power of the respective states' [referred to in] Hanson v. Denckla." *Buckley v. New York Post Corp.*, 373 F.2d 175, 181 (2d Cir. 1967).

A more ambitious attempt to delineate the factors relevant to a determination of the constitutionality of the assertion of *in personam* jurisdiction can be found in *Aftanase v. Economy Baler Co.*, 343 F.2d 187 (8th Cir. 1965), another case relied upon by Pepper. The Court outlined five factors to be considered in determining whether the fair play and substantial justice requirements were met: (1) the nature and quality of the contacts with the forum state; (2) the quantity of the contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience to the parties. A *seriatim* consideration of these factors makes it clear that the exercise of jurisdiction by New Jersey was consistent with constitutional requirements.

(1) and (2) *The quality and quantity of the contacts were such as to satisfy the constitutional requirements*

(i) Pepper purposely availed himself of the privilege of doing business with a New Jersey estate. His representation thereof had an impact on the probate administration of that state. By so doing, he invoked the benefit and protection of New Jersey's laws and could reasonably have anticipated that his actions and failures to act would have

consequences in New Jersey. Mrs. Arlinghaus, as executrix of the estate, depended on Pepper, as the attorney for the estate, for advice concerning the collection and disposition of the estate's assets, all of which would be done under the supervision of the New Jersey probate court. The mere acceptance of almost $20,000 out of estate assets had the consequence of reducing the amount available to the beneficiaries of the estate.

(ii) The payments to Pepper were made subject to the provisions of New Jersey Civ. Prac. Rule 4:42-9. During all times relevant herein, that rule provided:

> "(a) Actions in Which Fee Is Allowable. No fee for legal services shall be allowed . . . except:
>
> * * *
>
> (2) Out of a fund in court . . . . A fiduciary may make payments on account of fees for legal services rendered out of a fund entrusted to him for administration, *subject to approval and allowance or disallowance by the court upon settlement of his account.*
>
> * * *
>
> (b) Affidavit of Service. Except in tax and mortgage foreclosure actions, all applications for the allowance of fees shall be supported by an affidavit stating in detail the nature of the services rendered, the amount of the estate or fund, if any, the responsibility assumed, the results obtained, the amount of time spent by the attorney, any particular novelty or difficulty, the time spent and services rendered by paraprofessionals, other factors pertinent in the evaluation of the services rendered, and the amount of the allowance applied for, and an itemization of disbursements for which reimbursement is sought." (Emphasis added).

Had Pepper expressly agreed to be bound by this rule, the New Jersey probate court would undeniably have

jurisdiction over him. See *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964). Conversely, had he expressly refused to be bound by this rule, Mrs. Arlinghaus would not have been able to pay his fees on account. In light of Pepper's undertaking to represent the estate, the fiduciary duty owed by him to that estate and his submission of bills and acceptance of payments, it is not unrealistic to assert that Pepper had impliedly consented to submit to the jurisdiction of the New Jersey probate court.

In the instant case, the New Jersey court approved the payment of the fees by Mrs. Arlinghaus because they were made by her in good faith. See *In re Slater's Estate*, 88 N.J. Eq. 296, 102 A. 384 (1918). However, Pepper's failure to file the required affidavit of services prevented the New Jersey probate court from determining the value of the services allegedly rendered by him. Consequently, it disallowed the payment and ordered Pepper to repay the disallowed fees to the estate.* If this Court refuses to uphold that judgment, New Jersey will be effectively prevented from supervising the payment of legal fees out of estates probated therein unless it reverts to the practice prior to the enactment of Rule 4:42-9(a)(2) in 1961, under which practice legal fees could not be paid until approved by the court in an accounting.

(iii) While Pepper was able to rely on Mrs. Arlinghaus' trust in him and on the New Jersey statute to secure prompt payment of his legal fees without maintaining an action in New Jersey for them, he could have used the New Jersey courts to obtain payment if Mrs. Arlinghaus had refused to pay—if the estate had received any benefit from the legal

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*For similar holdings in other states, see *In re Estate of Ayers*, 420 Pa. 451, 218 A.2d 326 (1966); *In re Klappa's Estate*, 18 Ill.App.2d 50, 152 N.E.2d 754 (1958).

services and if there had been no conflict of interest on Pepper's part.

(iv) Pepper made use of the arteries of interstate commerce, including interstate mail facilities, in connection with his representation of the estate. In addition, Pepper himself contends that his work consisted, in part, of preparing and filing federal tax returns (860a-863a). Thus, it can hardly be said that his representation of the estate was, from a practical point of view, a local New York matter.

(v) The representation was significant in terms of both time and money. Pepper represented Arlinghaus' interests for over thirty years and was the attorney for the estate from 1964 to 1968. His income from the estate representation alone was almost $20,000.*

(3) *The cause of action clearly arose out of Pepper's contacts with New Jersey.*

The judgment against Pepper is directly related to his agreement to represent the estate and his acceptance of payment, on account, for legal services purportedly performed by him. As discussed in cross-appellant's main brief, at pp. 43-44, when the cause of action arises out of the defendant's contacts with the forum, those contacts need not be as substantial as in a case unrelated to the forum contacts.

(4) *The interest of New Jersey in providing a forum for this controversy is obvious.*

The administration of an estate of a domicile is clearly "an activity that the State treats as exceptional and sub-

*This figure, of course, does not include the profit made by Pepper in connection with his purchase, in his wife's name, of stock owned by the estate and sold to him during the period in which he represented the estate (399a-400a).

jects to special regulation." *Hanson v. Denckla, supra* at 252. The regulation of estate administration is much heavier than is that of the insurance business, *McGee v. Int'l Life Ins. Co., supra,* and the securities industry, *J.W. Sparks & Co. v. Gallos,* 47 N.J. 295, 220 A.2d 673 (1966). In fact, a five volume treatise has been written outlining the regulation of this activity in New Jersey, see A. Clapp, Wills and Administration, (Vols. V-IX New Jersey Practice) (1962); and New Jersey Civil Practice Rule 4:42-9, referred to *supra,* shows that New Jersey is concerned with the regulation of attorneys' fees in connection with its probate administration. As stated in *Riley v. New York Trust Co.,* 315 U.S. 343 (1942):

> "A state is interested primarily . . . in the administration of the property of its citizens, wherever located. . . . In a society where inheritance is an important social concept, the managing of decedents' property is a sovereign right which may not be readily frustrated."

See also *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313-314 (1950), wherein the Court stated:

> "[T]he vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified."

Pepper's actions herein were designed to frustrate the orderly administration of the Arlinghaus estate. The State of New Jersey cannot manage its decedents' property without supervising the payment of legal fees made by the estate. This supervision cannot be done unless the attorney submits proof substantiating the fees charged by, and paid to, him. A holding by this Court that New Jersey's method

of managing the estates of its domiciles is unconstitutional would inhibit the beneficial movement of various states, including New Jersey, to enable out-of-state attorneys to represent its residents when such representation is clearly in the best interests of those residents. See Note, *Attorneys: Interstate and Federal Practice*, 80 Harv. L. Rev. 1711 (1967).*

(5) *The convenience of the parties mandated New Jersey jurisdiction*

As Pepper asserts, the convenience of the parties is not normally a determinative factor in ascertaining the constitutionality of the assertion of *in personam* jurisdiction. But *cf.* Annot., 27 A.L.R.3d 397, 413-14 n.16. In the instant case, however, the convenience of the parties is much more important than in most cases. Normally, the issue is merely in which of two or more fora the action is more appropriately instituted. In the instant case the estate was being probated in New Jersey, the controversy was solely related to the administration of that estate, and the New Jersey court was the only court familiar with the facts and legal issues, especially since New Jersey law was applicable. Pepper's "[surmise] that the New Jersey forum was selected because of its inconvenience to [him]" (Ans. Brf., p. 27) is curious. The New Jersey legislature, not Mrs. Arlinghaus, required that the probate court determine the issue of whether to allow him to retain his fees. The fact that Pepper was the defendant in two actions in the Southern District of New York is irrelevant. Those litigations concerned questions of contract and securities

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*Pepper's contention that he has been accused of violating the "out-of-state practice rules" is irrelevant and patently unfounded. The New Jersey rule which formerly precluded an allowance of a fee to an attorney who was not a member of the New Jersey bar was repealed in 1964. See *In re Estate of Waring*, 47 N.J. 367, 374, 221 A.2d 193, 196 (1966).

law and were brought on behalf of a number of plaintiffs, only one of which was the executrix of the estate.

Thus, New Jersey's assertion of personal jurisdiction over Pepper was constitutionally valid because of (i) New Jersey's interest in the equitable administration of estates of its residents and its regulation of attorneys' fees paid in connection therewith; (ii) Pepper's agreement to serve as attorney for the Arlinghaus estate and his acceptance of legal fees paid on account, in accordance with the New Jersey Rules, by its executrix; and (iii) Pepper's awareness that his representation of a New Jersey estate, his acceptance of almost $20,000 of the assets thereof and his refusal to submit an affidavit of services to enable the probate court to properly exercise its supervisory function would have effects in New Jersey. Therefore, the judgment entered against Pepper on August 30, 1971 by the Monmouth County Court, Probate Division is entitled to full faith and credit.

CONCLUSION

By reason of the foregoing, the judgment rendered against cross-appellant dismissing her fourth cross-claim should be reversed and judgment should be directed in favor of cross-appellant and against cross-appellee on the fourth cross-claim in the amount of $19,842.19 with interest from January 2, 1968.

Respectfully submitted,

CASEY, LANE & MITTENDORF
Attorneys for Cross-Appellant

CASEY, LANE & MITTENDORF First Nat. Bd. ov Cin. v. Pepper

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of Feb. 197 6 deponent served the within Brief upon:

Brauner, Baron & Rosenzweig, Esqs.

attorney(s) for
Appellee

in this action, at
120 Broadway, NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 20
day of Feb., 197 6.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976